Additional Statement on Behalf of Claims of Uninsured Shipowners

by

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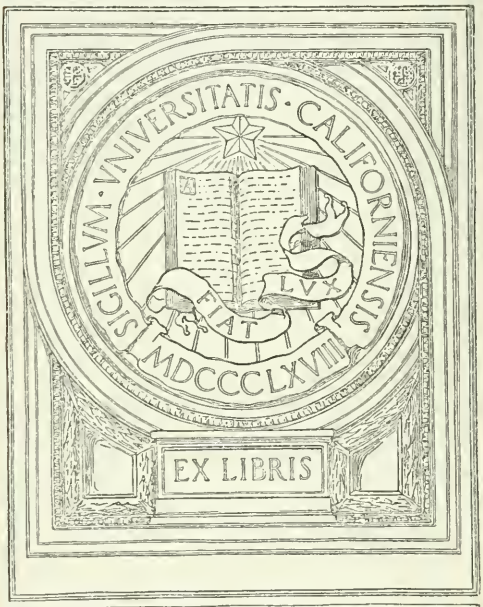

Additional Statement

ON BEHALF OF CLAIMS OF

Uninsured Shipowners,

On the Geneva Award, for Losses Occasioned by
"EXCULPATED CRUISERS,"

BY CEPHAS BRAINERD.

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STATEMENT.

I.—The controversy, as considered by the two Powers which resulted in the Treaty of Washington, and the Tribunal at Geneva, was a national controversy, and not a scramble about individual claims.

The language of the Treaty states this in substance in the VII Article which provides for an award of a gross sum.

II.—It was not a Claims Convention, and the Tribunal at Geneva did not meet and did not carry on its business, as under a Claims Convention.

1. There was no hearing of *evidence*—strictly so called—oral or documentary.
2. There was no hearing on individual claims.
3. There was no appearance of individual claimants.
4. There was no decision on individual cases.
5. There was no payment of individual claims.

The distinction between the two classes of treaties and proceedings is perfectly obvious. It is pointed out and illustrated in Mr. Sumner's Report on the French Spoliation Claims. (*Report Com. No.* 41, 38 *Con.* 1*st Ses.*; *Sumner's Works, vol.* 7, *p.* 204.) The methods of a Claims Convention are also very well shown in the private claims portion of the Jay or "British Treaty."

Here was the submission to the Geneva Tribunal of an action on the case for negligence by the United States against Great Britain for damages, and it was followed by an award of damages on *that case*—there having been a finding that there was negligence as to one cruiser, that was followed by an award of the "sum of $15,500,000 in gold as indemnity to be paid by Great Britain to the United States, for the *satisfaction of all* the claims referred to the consideration of the Tribunal."

In other words, the plaintiff avoided a nonsuit by establishing some negligence, and then by virtue of the declarations of the Treaty, as well as under general rules, got a verdict from the jury on the whole case as he had disclosed it before them.

Prior to the actual hearing, under an opinion volunteered by the Tribunal, the plaintiff had withdrawn certain so-called national claims, because he liked the ruling, and thought it established some law that would be useful to him in the future.

III.—Both governments understood the position to be as above stated. Mr. Fish so announced it in his letter to our counsel. Our counsel so announced it in the forefront of their argument, saying: "These claims are all preferred by the United States, as a nation, against Great Britain, as a nation, and are to be so computed and paid, whether awarded as a sum in gross under the Seventh Article of the Treaty, or awarded for assessment of amounts under the Tenth Article."

Our counsel repeated this near the close of the hearings, when replying to a reference made to the insurers by Sir Roundell Palmer. They said: "So far as Great

Britain and this Tribunal are concerned, who the private sufferers are, and whether they are insured or not, and have been paid for their insurance, are questions of no importance."

So Mr. Gladstone, the Premier, from his place in the Commons, said:

"No claims of individuals have been submitted to arbitration in relation to the 'Alabama.' What was submitted to arbitration was entirely a question between the two Governments."

Note.—Here lies the distinction which, under the technical law, excluded the very technical claim of the insurance companies. There is nothing to which they can apply the doctrine of subrogation. If, as under the Jay treaty, there had been a distinct award for a particular loss, and a payment of a British Government draft to the insured, that insured, in the language of Lord Hardwicke, would have held as "trustee for the insurer."

But here is a general fund of indemnity from a new source,—not from the thing destroyed,—from no one responsible to the individual sufferer, "a donation," in the language of Sir Thomas Plumer, and so another class of cases apply. (*Campbell* vs. *Mullet*, 2 *Swans. Chy.*, 551, 613; *De Bole* vs. *Reg*, 8 *Q. B.*, 217; *Rustomjee* vs. *Reg.*, 1 *Law Rep., Q. B. D.*, 487; *Same Case on Appeal*, *Feb.*, 1877; *Burnand* vs. *Rodocanachi*, 44 *L. T.* (*N. S.*) 538.

Note again.—The case last cited arose under the Geneva Award. It was an attempt of an insurer, by virtue of subrogation, to reach the sum awarded by our court of Alabama claims to the insured owner, for

the value of his ship, in excess of the amount paid on a valued policy as for a total loss, the precise claim regularly and logically asserted by the insurers here. The court adopted the view early expressed by Sir Thomas Plumer, and held that the payment was not salvage—it was not of the *spes recuperandi*, "but a gift," or, as the Master of Rolls had it, "a donation from a new fund." (*See especially opinion of Brett, L. J.*)

IV.—The award was in satisfaction of all the *claims*, but it was founded on losses, (*i. e.*, not on the claim of an insurance company for insurances.) Mr. Davis, our agent, in his report, says:

"We, therefore, devoted our energies towards securing such a sum as should be practically an *indemnity* to the *sufferers*. Whether we have or have not been successful can be determined only by the final division of the sum." (*Papers, &c., vol.* 4, *p.* 8.) If Congress decides to pay insurance companies as for a total loss under their claims of subrogation, the question raised by Mr. Davis will be soon decided. The "sufferers" now unrecognized will get nothing, and the insurance companies, who are in no sense "sufferers," will take, substantially, the whole fund.

V.—It is not understood that the insurance companies ever claimed as actual losers. When this discussion began they disclaimed an appearance in that attitude. Mr. Evarts, their leading counsel, in a brief filed in 1874, (p. 6), said: "The insurer does not apply for a share of this indemnity because he lost money during or by reason of the war. However that may be, it

gives no interest in the fund. The insurer *represents* the insured owner of property destroyed by a cruiser, whom Great Britain has been adjudged to indemnify. Whatever the fortunes of the insurer in other risks may have been, they cannot affect *his representative rights under the Geneva Award, to which his assignee would have been entitled.*" The italics are my own Here is asserted to the full, the right, and only the right of subrogation, but that right in all its length and breadth.

Originally the insurance companies claim the whole value of ships and cargoes insured by them on war risks—not the return of the sum paid by them on account of the risks.

1. Under the doctrine of subrogation,

"It has long been fixed law, that when the insurer pays the full valuation" [*i. e.*, valuation named in the policy] "he takes the savings in any form arising for the share insured, and he takes all the rights of action and claims for the injury which occasioned the loss. He is a mere purchaser at an agreed price for the whole adventure"

Argument for Ins. Cos. by C. B. Moore, p. 25, 1873.

"Such payment gives the insurer a complete title to what may afterwards be recovered, in any way, either of the property itself, or in money from parties who have injured it, or got the proceeds."

Id., p. 92.

"These losses [*i. e.*, on war risks] were promptly paid, as the proofs were presented, and the usual assignments were executed by the assured, on receiving payment.

The company was thus invested with the legal rights pertaining to the property destroyed, and was substituted in the place of the individual owners." * * *

Pamphlet ascribed to Wm. H. H. Moore, V. P. of Atlantic Ins. Co., N. Y., p. 6, 1873.

On payment for a "total loss," that is the amount of a valued policy, or an agreed amount under an open one: "The underwriter acquires the absolute right to every hope or possibility of salvage or reclamation from or by reason of the property, or its destruction or injury."

Pamphlet of C. A. Hand, Counsel for Ins. Cos., 1876.

"The award was for the single value of ships and cargoes. To whom it was to be paid was left to depend on the fact and the right. If the owner was uninsured, it was to be paid to him. If the owner was insured, but his loss had not been paid by the insurer, it was to be paid to him. If the loss had been paid by the insurer, he therefore became the owner, and the loss was to be paid to him."

Pamphlet of J. M. Van Cott, Counsel for Ins. Co., p. 14, 1876.

Mr. Richard Lathers says, in his pamphlet for insurance companies, 1878, p. 3, referring to the presentation of claims: "First recapitulating the names and value of each vessel, freight and cargo, naming each owner and claimant individually, whether interested as owner and claimant individually, whether interested as owners, *or as subrogated insurers of the property destroyed.*" * *

On the same page he says, "The direct losses claimed by individual sufferers, *and the underwriters who were subrogated to them*," [*i. e.*, to the individual sufferers.]

2. Again, the insurers claimed the whole of such values, irrespective of the sum paid by virtue of alleged assignments from the original owners, which assignments the insurers exacted when the losses were paid.

Mr. C. B. Moore, in the pamphlet above cited, says, (p. 30): "And thereupon assignments were taken, in many instances, by which the owner of vessel or cargo assigned and transferred to the insurer all right and claim to recover or receive from any one, the property insured or any compensation for it, or claim for damaging or destroying it."

Mr. W. H. H. Moore says, in his pamphlet, (p. 3): "The usual assignments were executed."

Mr. Richard Lathers, in his pamphlet, (p. 1), says: "Taking, as usual, an assignment of the claims."

3. The views of the minority of the Judiciary Committee of the House in 1874, went the whole length of this claim (p. 23).

"The right of the insurer in case of abandonment, to succeed to every possible claim of the assured upon payment of the amount insured, not a technical but a natural right."

The same proposition was repeated by the minority of the same Committee in 1876 (p. 7).

"The insurer who has paid the owner as for a total loss is entitled to be subrogated to all the rights of the assured in respect of the subject matter of the insurance."

4. In 1879, Mr. J. Langdon Ward, of counsel for the insurance companies, (page 14 of his pamphlet of that year), seems to have modified the view theretofore insisted on, and asserted that the insurer on "paying a total loss, became *pro tanto* the owner of the insured thing; that is, if he has insured one-half the value of the thing, he becomes, on payment of his insurance, a half owner of the thing."

I think he does not, in fact, mean to make a change.

In the present discussion Mr. Ward and Mr. Lathers only claim the sum paid on policies, with, I suppose, proper interest; and Mr. Ward puts that claim on the proposition that it rests in the conscience and sense of public justice of Congress to recognize it.

It is proper to ask here how long it would take the insurance claimants, if circumstances favored them before Congress, to fall back on their original claim?

And further: If they had this case in a court, which cannot, as was said by *Maule, J.*, in the *De Bode case*, "administer general justice," how long it would take them to assert that their claims on the fund by virtue of subrogation and by virtue of their assignments touched the total value of the insured thing, no matter what the sum might be that was paid by them on it as for a total loss?

And finally, would Congress for one moment tolerate such an enormity?

VI. I have shown that the insurance companies cannot assert a claim on this fund by virtue of the doctrine of subrogation.

They cannot claim as losers. I quote from a pamphlet written by Mr. John H. Brower, an eminent New York merchant, now deceased, (p. 5).

"The net profits of the eight New York companies for the years 1861–65 on the total amount of premiums received amounted to $28\frac{755}{1000}$ per cent. For the same eight companies the net profits for the years 1866–1870 amounted to $25\frac{387}{1000}$ per cent. Thus the years of the war were more favorable to these eight companies by $3\frac{360}{1000}$ per cent., or $2,295.332\frac{96}{100}$, after paying all losses, war and otherwise, than the five years of peace (1866–1870) which followed." Clearly then the insurers in mutual companies, in spite of war losses, paid less for their insurance during the war than in times of peace, for they received back a larger dividend. This larger dividend came from the war business. It cannot be pretended that with all the fluctuations of business, and the suspicions as to credit, that these companies did a larger marine risk business during the war, than subsequent thereto. The war premium payers were then the only people insured who suffered damages, for the marine risk men got back from the mutual companies larger dividends, therefore their insurance at a less cost, than prior or subsequent to the war.

Congress, in the exercise of its high governmental trusts, is not called upon to give of the Geneva award, to the mutual companies, to enable them, by extra dividends, to reduce the marine premiums to nothing during the war. It is enough for marine risk payers that they got protection and indemnity for a less proportionate sum during the war than before or since

that epoch, while all other dealers were paying vastly enhanced prices for all they had. The war-premium payers declare that they don't care to have their share in the Geneva award paid to these corporations. So Congress, in the exercise of its high trusts, can, without prejudice to any public interest, safely dismiss the corporations from its halls.

VII.—It being clear that the government holds this fund as one of indemnity, and not as a fund for the payment of special and adjudicated claims, it must hold it just exactly as the Queen of England held the fund in the *Rustomjee case*. Said Mr. Justice Strong, giving the *per curiam* opinion in *Savings Bank* v. *U. S.* (19 *Wall*, 227, 239), "It may be considered as settled, that so much of the royal prerogatives as belong to the king in his capacity of *parens patriæ*, or universal trustee, enters as much into our political State as it does into the principles of the British constitution."

A government is undoubtedly bound to protect its citizens in their persons and their property to the extent of its ability, both from internal and external injuries. It is bound to seek, by just and feasible methods, a redress for such injuries; if domestic, by a proper application of its authority; if foreign, by negotiation in the first instance, and by force in the second, if the magnitude and enormity of the aggression justify a resort to arms.

And this duty of protection carries with it the duty of the parent government to indemnify those it has failed to protect, out of its own treasury, in some cases. (*See, among other, Dana's Wheaton, p.* 548, § 540;

Whewell's Grotius b. 3, *c.* 20, § 7 ; *Hamilton's Life, by Hamilton, vol* 2, *p.* 446 ; *Phillipp's Jurisprudence, p.* 222–3, § 241, *and. notably, case Brig.-Gen. Armstrong in the Court of Claims, reported as a single case in* 1857.)

England, at least, once discharged this duty. The American loyalists, in full reliance on the governmental duty of protection, adhered to the cause of the mother country until they lost all, even their homes : property was gone, and they could not even abide in the land where they were born. They appealed to the Crown. A bill was drawn by Mr. Pitt, which became law, under which a very large sum was appropriated to satisfy these claims. It was paid out on a sliding scale designed to accomplish the laudable object of giving the larger proportionate sum to those who in losing all had yet lost but a small amount of property. The representatives of all parties united on this bill—Fox, Burke, and Pitt for once agreed. (*See Cobbett's Par. Hist*, *vol.* 27, *pp.* 610–619; *vol.* 25, *p.* 323 ; *vol.* 23, *p.* 1044 ; *Burke's Speech, vol.* 3, *p.* 347 ; *Stat. at Large, vol.* 34, *p.* 370 ; *vol.* 35, *p.* 262, 474, 698 ; *vol.* 36, *p.* 687.)

In that case the money was taken from the general treasury.

Here and now, in the case of the uninsured losers by the so-called exculpated cruisers, we have :

(1) The duty of protection.

(2) The actual promise of protection.

(3) The actual promise to secure an indemnity from Great Britain, if possible, in case the governmental promise and duty of protection were not fulfilled.

(4) An actual reliance on this duty and these promises.

(5) The failure to fulfill the duty and promise of protection

(6) The receipt from the offending neutral of a sum of money, as indemnity for the negligence on account of which these claimants suffered, ample in amount to pay every person, who really *lost*, almost in full for such actual losses.

And yet legislators hesitate; they allow the claims of corporations, that suffered no loss, to stand in the way of right and duty. Let them take example from the British Parliament, and pay the sufferers; but this time out of British money.

Can there be any doubt as to what is right and justice? Can there be any doubt as to what the "conscience and sense of justice of the sovereign power" should do?

Judge Davis, in his speech in the Senate, in 1879, said that claimants for losses by exculpated cruisers had no more claim on this fund than had the sufferers by John Morgan's raids. No doubt he believes this. But let his proposition be tested. Suppose that John Morgan, instead of starting on his raid from a Confederate base, in the Confederate States, with a genuine Confederate outfit, had gone alone to Canada, had there gathered a force of Canadians, had armed them with Canadian arms, and the Canadian government, in spite of warnings that raids were constantly plotted in Canada, had allowed him to escape with his troops and devastate the Senator's State. Suppose, then, Great Britain had made a general payment on account of all raids, some excusable, some not excusable, as in the case

of the Alabama claims, and the question of distribution had arisen, as this has done! How would the learned Senator have stood?

It is very easy to see the Senator's put case is not on all fours with the real one. No; after all who really suffered loss by the acts complained of by the United States which resulted in the treaty of Washington are fully paid, all sufferers by the war may have a just claim on the indemnity fund, and when these latter are paid in full, then, and only then, will it be right for Congress to cover any portion of the award into the Treasury.

VIII.—The proposed reference of this whole matter to the courts remains for a single observation; clearly it would be unjust to refer the matter without accompanying that reference with a declaration that the courts selected or created for the purposes of the case so referred, stand in the place of Congress, and act under its (Congress's) "conscience and sense of justice," else the court will say as a member of this committee suggested on the hearing, "This court cannot create or settle great governmental principles, or discharge great governmental trusts, as can Congress, therefore Congress meant to have the rules of technical law applied to the case." Where would the fund, and where would the claimants, and where would the government be in such a case? The court could not dismiss the case so referred to it from its docket, or turn the plaintiff out of court. It might feel as Lord Eldon expressed himself in *Vulliamy* vs. *Noble*, (3 *Merivale*, 437, 452): "This is a bill, by creditors seeking relief due to them under *every con-*